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A NEW PARADIGM FOR PROTECTION: FIRST AMENDMENT PRINCIPLES AND THE ENVIRONMENT

Jennifer D. Jones

Abstract: Currently, environmental plaintiffs pursue protection for the ancient forests of the Pacific Northwest by litigating procedural violations of environmental statutes. This method, however, will not provide the long-term protection these plaintiffs desire. This Comment proposes a new model for protection using the First Amendment of the United States Constitution.

Creating a new theory is not like destroying an old barn and erecting a skyscraper in its place. It is rather like climbing a mountain, gaining new and wider views, discovering unexpected connections between our starting point and its rich environment. But the point from which we started out still exists and can be seen, although it appears smaller and forms a tiny part of our broad view gained by the mastery of the obstacles on our adventurous way up.

Albert Einstein (1879–1955)

In the Pacific Northwest, a debate continues to rage in private homes, in the media, and in the courts over whether, and to what extent, the U.S. Forest Service should preserve old-growth forests.¹ The logging industry firmly believes that the land on which ancient timber stands would be more productive if harvested and replanted with a new crop of timber. On the other hand, environmentalists view productivity as more than a short-term economic proposition and therefore would resolve the question in favor of preservation. The preservationists' current tools for forcing protection of the forests are the Endangered Species Act (ESA)² and the National Forest Management Act (NFMA).³ By litigating procedural violations of these acts, environmentalists have successfully

1. Unfortunately, there is no comprehensive definition of old-growth forest. Generally speaking, different people define old-growth in different ways, depending on their purpose for doing so. For example, those who see forests as fiber factories define them in terms of wood production. Each national forest also creates its own definition for the purpose of drafting national forest management plans. See Elliott A. Norse, *Ancient Forests of the Pacific Northwest* 56–61 (1990). The Forest Service defines old-growth ecologically, using multiple, objective criteria. For each criterion, the forest must meet a minimum standard in order to qualify as old-growth. The standard depends on the type of trees on the site. *Id.*

2. 16 U.S.C. §§ 1531–1543 (1988).

3. 16 U.S.C. §§ 1600–1687 (1988).

slowed the logging of old-growth on public lands. These victories, however, fall short of the ultimate goal of long-term preservation.

This Comment presents a different approach to the problem of preserving the ancient forests. The theory is submitted in two parts. First, the Comment contends that the First Amendment to the U.S. Constitution upholds a societal right to access information in addition to its guarantee of the individual right to expression. Second, it argues that the First Amendment is based on a system of values. In the context of cases upholding society's right of access to information, the Supreme Court implicitly recognizes the values of self-fulfillment, the attainment of knowledge and truth, and the participation by members of society in decision making, and uses them to justify application of the First Amendment. This Comment argues that courts and lawyers can use a similar First Amendment methodology to protect ancient forests.

Part I describes the difficulties environmental plaintiffs encounter in arguing for a constitutional right to preservation and details the old-growth controversy. Part II discusses First Amendment jurisprudence and establishes the value model of the First Amendment. Finally, part III applies the value model to the old-growth controversy and concludes that the three identified First Amendment values are present in the environment. The existence of these values, together with society's right of access to information, forms the basis for a theory that environmentalists can use to argue that courts should base protection of the ancient forests on the First Amendment interests that lie within them.

I. THE DIFFICULTY OF USING CONVENTIONAL CONSTITUTIONAL THEORIES TO PROTECT THE ENVIRONMENT

Plaintiffs seeking protection for ancient forests face three obstacles to the relief they desire. First, they must prove they have standing to sue. A second problem is the lack of textual support in the federal Constitution for substantive protection. Finally, if they choose to challenge the government's procedural violations of environmental statutes, they will discover that the remedies available to them are inadequate to achieve their goal of complete, long-term protection.

Legal standing is frequently an obstacle to citizen access to the judicial system in environmental cases. The Article III "Case and Controversy" Clause⁴ requires that a party seeking to litigate a

4. U.S. Const. art. III, § 2.

constitutional claim demonstrate a personal interest in the controversy's outcome.⁵ A personal interest exists if litigants can show that they in fact suffered an injury caused by government action.⁶ Generalized grievances, as opposed to particularized injuries, are not justiciable.⁷ One reason environmental litigants have had little success in getting judicial recognition of environmental rights is that courts often view environmental impoverishment as a community, rather than an individual, injury.⁸ Since environmental wrongs usually cause community injuries, the "personal stake" requirement can be difficult to fulfill. Although the citizen suit provisions in many environmental statutes were designed to alleviate this problem, the absence of an "injury in fact" is still the basis for dismissal of many lawsuits.⁹

In courts¹⁰ and in law journals,¹¹ plaintiffs and commentators argue for the constitutional protection of a clean, healthy environment. The proponents of environmental protection generally claim that individuals have a fundamental right¹² to environmental preservation under a

5. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

6. *Id.*

7. *See United States v. Richardson*, 418 U.S. 166, 176–79 (1974) (stating that the proper resolution of a generalized grievance is through political pressure placed upon Congress, not an individual suit).

8. *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

9. *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *see also* Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit: Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990), 66 Wash. L. Rev. 893 (1991). A 1972 article by Professor Christopher Stone suggested that this problem could be solved if the courts accepted that environmental inanimate objects, such as trees, retain innate legal rights. Environmental plaintiffs would represent these legal rights by serving as legal guardians authorized to speak on their behalf. Stone argued that this idea is not novel, for many inanimate objects have been recognized as possessors of rights. Extending legal rights to trees is no different than recognizing rights of corporations, ships, nation-states, and trusts. Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

10. *See* *Concerned Citizens of Nebraska v. United States Nuclear Regulatory Comm'n*, 970 F.2d 421 (8th Cir. 1992); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

11. *See, e.g.,* Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 Ind. L.J. 203 (1974); E.F. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in *Law and the Environment* 134 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970); Note, *Toward a Constitutionally Protected Environment*, 56 Va. L. Rev. 458 (1970).

12. A fundamental right may lie within the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments, meaning the right is implied from rights which are expressly enumerated. *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965). Alternatively, a right may be fundamental

combination of the Fifth and Fourteenth Amendments' protection of "life, liberty and property,"¹³ and the Ninth Amendment's protection of interests not explicitly enumerated in the Constitution.¹⁴ If a court were to accept this argument and find that the legislation or activity being challenged directly burdens this right, the court would analyze the government action by utilizing strict scrutiny, the highest standard of judicial review. Under this standard, the government must show that the challenged legislation or activity serves a compelling interest, and that there is a close fit between that interest and the means the government chooses to achieve it.¹⁵ This test is so exacting that the state action will rarely withstand review.¹⁶

The Constitution provides no textual support for recognition of a fundamental right to an unadulterated environment,¹⁷ and no court has ever found a federal constitutional right to environmental preservation.¹⁸ Furthermore, no court is likely to so find in the foreseeable future.¹⁹ Courts rarely invalidate governmental action that threatens environmental degradation absent a substantive or procedural violation of an environmental statute.²⁰

Recent attempts to protect the Pacific Northwest's ancient forests using the northern spotted owl's status as an endangered species are an

because it is deeply rooted in our nation's history and traditions, through which basic moral and cultural values are passed down. *Id.* at 486; *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977).

13. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

14. U.S. Const. amend. IX.

15. John E. Nowak et al., *Constitutional Law* § 11.4, at 357 (3d ed. 1986).

16. *Id.*

17. Some state constitutions do specifically recognize a right to a clean or healthful environment. *See* Ill. Const. art. XI, § 2; Mont. Const. art. II, § 3 (amended 1972); Pa. Const. art. I, § 27.

18. *See, e.g.*, *Concerned Citizens of Nebraska v. United States Nuclear Regulatory Comm'n*, 970 F.2d 421 (8th Cir. 1992); *Gaspar v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

19. The Supreme Court succinctly expressed its reluctance to expand the circle of fundamental rights in *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.").

20. Courts have enjoined state actions that adversely affect the environment on common law grounds. *See Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

example of preservationists' pursuit of procedural routes to environmental protection.²¹ A series of suits brought by the Seattle Audubon Society and other environmental groups did not include any constitutional claims.²² Instead, the plaintiffs relied on procedural violations of the NFMA²³ and the ESA.²⁴ This strategy has been successful because it forces the Forest Service to halt the logging of public lands while complying with the procedural requirements of these acts. These victories, however, fall short of providing a substantive basis for the long-term goal of preservation. These plaintiffs need authority for the proposition that the Forest Service should refrain altogether from logging ancient forests. By recognizing the applicability of First Amendment interests in this controversy, courts would provide the ancient forests with far greater protection.

II. FIRST AMENDMENT JURISPRUDENCE

In addition to the First Amendment's protection of the individual's right to speak freely, the First Amendment protects society's right of access to information. In so doing, the First Amendment accomplishes three goals. First, it helps individuals realize self-fulfillment. Second, it advances knowledge and promotes the discovery of truth. Third, by augmenting humankind's store of knowledge, the First Amendment increases and improves individual participation in decision making. The cases on access to criminal trials demonstrate the Court's recognition of the goals behind the First Amendment. These cases also illustrate the First Amendment's protection of societal, as well as individual, rights.

A. *The First Amendment and the Furtherance of Societal Goals*

While the First Amendment addresses the right of the individual to unfettered expression,²⁵ the Supreme Court repeatedly has recognized

21. The ESA mandates that the Forest Service create a recovery plan for the spotted owl. The recovery plan must include a designation of habitat that is critical for the species' survival. 16 U.S.C. §§ 1532-1534 (1988). Since the spotted owl requires a large area of old-growth forest for its habitat, the ESA and the spotted owl are important elements of the environmentalists' general strategy to preserve the ancient forests.

22. See *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd in part and rev'd in part*, 952 F.2d 297 (9th Cir. 1991); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

23. 16 U.S.C. §§ 1600-1687 (1988).

24. 16 U.S.C. §§ 1531-1543 (1988).

25. U.S. Const. amend. I.

that the audience (or potential audience) has an independent First Amendment interest in the information sought to be communicated.²⁶ In this sense, the First Amendment addresses societal interests because the ultimate effect of the individual freedoms it guarantees is to further the interests of society at large.

The Court has upheld the First Amendment's guarantee of the right of access to information in a variety of contexts. For example, the Court has recognized that society has an interest in, and a First Amendment right to, commercial and consumer information.²⁷ A restriction on access to such information is unconstitutional absent a significant governmental interest. In *Lamont v. Postmaster General*,²⁸ the Court considered the constitutionality of a statute allowing the government to withhold "communist political propaganda" arriving from another country unless the addressee requests its delivery in writing.²⁹ The Court held that this restriction placed an unjustifiable burden on the addressee's First Amendment right to receive information.³⁰ Another Supreme Court decision, *Stanley v. Georgia*,³¹ invalidated a state law prohibiting private possession of obscene material, in part on the ground that the First Amendment protects the right to receive information and ideas.³² The First Amendment's protection is not dependent on the social worth of the information.³³ These cases illustrate the Court's belief that First Amendment protection exceeds an individual's right to self-expression, and encompasses a greater societal right by prohibiting the government from limiting public access to a particular source of information.³⁴

These cases do not stand for the proposition that the government has an affirmative duty to supply information or to provide the public with a

26. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (freedom of speech includes "the right to receive, the right to read"); Melville B. Nimmer, *Nimmer on Freedom of Speech* § 1.02[F] (1984).

27. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

28. 381 U.S. 301 (1965).

29. *Id.* at 303.

30. *Id.* at 307.

31. 394 U.S. 557 (1969).

32. *Id.* at 564.

33. *Id.*

34. See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (holding that the spirit of the First Amendment forbids the state from contracting the spectrum of available knowledge).

special right of access to information.³⁵ The Court reiterated this in *Board of Education, Island Trees v. Pico*.³⁶ The removal of books from school library shelves, the Court held, unconstitutionally restricts students' access to information and ideas. In dicta, the plurality explicitly denied that its decision would affect a local school board's discretion to choose which books to add to school libraries.³⁷ The students had a right to the information that already existed within the school library; this information could not constitutionally be removed. The students' First Amendment rights, however, did not obligate the school board to provide the students with particular information via library books. The *Pico* Court found the students' right to be less than absolute partly because of the school board's duty to shape their young minds, and partly because the school board did not have an affirmative duty under the First Amendment to provide information. The First Amendment merely forbids the denial of information already available.

B. *Values Implicit in the First Amendment*

The Supreme Court and commentators have recognized that the First Amendment embodies certain values of a democratic society.³⁸ These values include individual self-fulfillment, the advancement of knowledge and truth, and participation by members of society in decision making.³⁹

35. *But see* *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939). These cases hold that speech in a "public forum" may be restricted only if the restriction is a narrow one which is necessary to serve a significant governmental interest. In essence, these cases guarantee access to streets, parks, and other public forums, and seem to require adequate and nondiscriminatory provision of police protection for demonstrations.

36. 457 U.S. 853 (1982). *See also* *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (explaining that the First Amendment does not mandate a right of access to government information or sources of information within the government's control).

37. 457 U.S. at 871.

38. *See, e.g., infra* notes 46–74 and accompanying text. *See also* Thomas I. Emerson, *The System of Freedom of Expression* (1970); Alexander Meiklejohn, *Testimony on the Meaning of the First Amendment* (1960); Nimmer, *supra* note 26; Martin Redish, *Freedom of Expression: A Critical Analysis* (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

39. Emerson, *supra* note 26, at 6–7. Professors Emerson and Baker include a fourth value of maintaining a balance between stability and change in society. This value, however, has little practical importance and is subsumed by the first three. Therefore, it has been omitted from this discussion. Other First Amendment scholars either single out one of these values or argue for a combination of two or more as the basis for their theories. *See supra* note 38.

The Court's decision to extend First Amendment protection in any particular case often depends upon the existence of these three values.

The Supreme Court, either explicitly or implicitly, has recognized these values as the basis for protection of expression. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁴⁰ the Court determined that commercial speech merits First Amendment protection by identifying the ways in which such information promotes the three major First Amendment interests. The first interest the Court identified is an individual interest in self-expression.⁴¹ This corresponds to the value of individual self-fulfillment, because the freedom of self-expression is essential for individuals to realize self-fulfillment.⁴² The Court also recognized both an individual and a general societal interest in the free flow of information that advances knowledge and leads to the discovery of truth.⁴³ Finally, the Court identified a more specific societal interest in enlightened public decision making.⁴⁴ This interest corresponds to the final First Amendment goal of achieving participation by the members of society in decision making. The increased and uninhibited dissemination of information leads to more enlightened public decision making, which in turn may reduce the potential for hostile expressions of opinion.⁴⁵

The following discussion details the three values, which overlap to some extent. Since a greater flow of information improves the public's ability to make decisions, the overlap is especially evident when these two functions of the First Amendment are compared. Each is sufficiently distinct, however, to warrant separate consideration.

1. *Individual Self-Fulfillment*

In the context of the First Amendment, self-fulfillment can be defined as the autonomous control over personal development and expression.⁴⁶

40. 425 U.S. 748 (1976).

41. *Id.* at 762-63.

42. *See infra* notes 46-52 and accompanying text.

43. *Virginia Bd. of Pharmacy*, 425 U.S. at 763-64.

44. *Id.* at 765.

45. *See infra* notes 59-62 and accompanying text.

46. Professor Emerson's definition is more complete:

[F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature.

More specifically, unfettered expression allows individuals to develop fully their intellects, tastes, and personalities,⁴⁷ and thereby promotes individual self-realization and self-determination.⁴⁸ Governmental suppression of speech or restrictions on access to the ideas of others effectively subjugate the individual and inhibit his or her creativity. The First Amendment encourages self-fulfillment by allowing individuals to form personal opinions and values based on a wide range of information.

The self-fulfillment value also has a political dimension and is implicit in the American democratic system of government. The First Amendment has become a symbol of democracy, which is viewed as a means of achieving individual control of personal destiny and full development of the individual's human faculties. More than one Supreme Court Justice believes the First Amendment is essential to the realization of true democracy.⁴⁹

The Court has recognized that the First Amendment aids individuals in achieving self-fulfillment. In a case involving the constitutionality of a Chicago ordinance restricting picketing, the Court stated that the First Amendment guarantee of free expression allows the continued development of politics and culture and assures self-fulfillment for individuals.⁵⁰ Justice Marshall, in a concurring opinion in *Procunier v. Martinez*,⁵¹ argued that the First Amendment serves not only the needs of

Moreover, man in his capacity as a member of society has a right to share in the common decisions that affect him. To cut off his search for truth, or his expression of it, is to elevate society and the state to a despotic command over him and to place him under the arbitrary control of others.

Emerson, *supra* note 38, at 6. See also Ronald Dworkin, *Taking Rights Seriously* (1977); Redish, *supra* note 38; Baker, *supra* note 38; David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974).

47. See *Roe v. Wade*, 410 U.S. 113, 211 (1973) (Douglas, J., concurring).

48. Martin Redish, another First Amendment theorist, takes this idea even further. According to Redish, the term "individual self-realization" refers to either the development of the individual's powers and abilities, or the individual's control of his or her own destiny. Redish argues that the other values accepted by most First Amendment scholars, such as the "political process," "checking," and "marketplace-of-ideas" are in reality mere subvalues of self-realization because ultimately, they are the means to that end. See Redish, *supra* note 38, at 9-12.

49. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brennan phrased it quite eloquently: "[T]he First Amendment protects the structure of communications necessary for the existence of our democracy." William J. Brennan, Jr., Address at the Dedication of the S. I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 Rutgers L. Rev. 173, 176 (1979).

50. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

51. 416 U.S. 396 (1974).

the polity but also those of the human spirit, which demand expression. Marshall believed that expression is an integral part of the development of ideas and a sense of identity, and that its suppression damages the individual in two ways. When the government squelches expression, it is also rejecting the basic human desire for recognition. This offends the individual's worth and dignity.⁵²

2. *Advancing Knowledge and Obtaining Truth*

While the First Amendment benefits individuals to the extent it encourages self-fulfillment, it also benefits society by guaranteeing the freedom to receive information. The Supreme Court has long attached great importance to the informational purpose of the First Amendment, declaring that the public must have sufficient access to social, political, aesthetic, moral, and other ideas and experiences.⁵³

Cases recognizing the First Amendment's protection of the receipt of information stand for the proposition that allowing as many ideas as possible into society encourages discussion and debate.⁵⁴ Discussion and debate reveal different versions of and flaws in theories, thereby enabling individuals to reach the truth⁵⁵ (although the "truth" may vary from one individual to another). Since the validity of "truth" depends on the

52. *Id.* at 427. See also *Herbert v. Lando*, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting) ("Freedom of speech is itself an end . . . intrinsic to individual dignity . . . in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect."); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (claiming that because individuals are becoming more anonymous in today's society, it is imperative that the First Amendment function of assuring individual self-fulfillment be preserved); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 272 n.13 (D.C. Cir. 1973) (agreeing with Professor Emerson that unrestricted speech and an individual's search for self-fulfillment and truth are inextricably bound together); *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 655 (D.C. Cir. 1971) (stating that the First Amendment value of individual self-fulfillment through expression has long been recognized).

53. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). See also *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (Stevens, J., dissenting) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

54. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .").

55. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

information that forms its basis,⁵⁶ an unrestrained flow of information will result in better informed decisions regarding any given controversy.⁵⁷ If the government can suppress information, society's search for truth will suffer.⁵⁸

3. *Securing Participation of Members of Society in Decision Making*

Society's capacity for decision making likewise suffers from restrictions on the flow of information. Information can aid decision making directly by improving knowledge on a given subject. Information also aids decision making indirectly by forming the basis for opinions and ideals on which personal and political decisions are made.⁵⁹ Information therefore plays a fundamental role in a democracy.⁶⁰ A democracy cannot function unless it allows people to gather the information they need to exercise their privilege of self-determination effectively. In this sense, freedom of expression indirectly helps individuals control their own destinies.⁶¹

In aiding individual decision making, the First Amendment also benefits society in two ways. First, most individual decisions directly impact others in society. An individual's decision to vote for or against a school initiative, for example, may affect the quality of education in that

56. Nimmer, *supra* note 26, § 1.02[A], at 1-9.

57. Admittedly, this definition of truth is tautological, since truth is a decision based on all available information.

58. The Court has recognized that some limitations are appropriate. For example, child pornography arguably is a source of information. However, in the balancing process, the interest of the state in protecting minors, combined with the fact that denying access to this type of pornography is the best way to prevent its creation, is compelling enough to outweigh the individual right of expression. See *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

59. Although the First Amendment does safeguard sources of information that aid individuals in decision making, it does not follow that the First Amendment only applies to political sources of information (for example, voter pamphlets). Nonpolitical sources of information, such as art, literature, commercial speech, and even obscenity, also contribute to this background of ideas and opinions upon which individuals base their personal and political decisions. See Alexander Meiklejohn, *Testimony on the Meaning of the First Amendment*, in *Alexander Meiklejohn: Teacher of Freedom* 229, 239 (Cynthia Stokes Brown ed., 1981).

60. James Madison once said: "A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Trajedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives." 9 *Writings of James Madison* 103 (Hunt ed. 1909), quoted in David S. Cohen, Note, *The Public's Right of Access to Government Information Under the First Amendment*, 51 Chi.-Kent L. Rev. 164, 176 (1974).

61. See *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

particular school district. A free flow of relevant information will enable individuals to make better decisions. Second, by safeguarding the information essential to rational decision making, the First Amendment stabilizes society. Without the First Amendment, individuals would be more likely to form opinions and beliefs on the basis of incomplete or inaccurate information. These individuals would also be more likely to express their opinions and beliefs in a hostile manner, which would disrupt society.⁶²

The three values underlying the First Amendment are interrelated and mutually dependent. Society needs to access information and ideas in order to make better informed decisions. This body of information and ideas also contributes to the development of individuals' opinions and values. In light of this need for information, the Court should protect these values underlying the First Amendment in all settings where the government controls access to information in some way.

C. *Judicial Use of the First Amendment Values*

The right-to-access cases demonstrate the role that the First Amendment values play in actual judicial decision making.⁶³ The first of these, *Richmond Newspapers, Inc. v. Virginia*,⁶⁴ concerned the constitutionality of a court order barring the press and public from attending a criminal trial. The Supreme Court decided that this order violated the First Amendment guarantees of free speech and press, even though the freedom in question was not precisely that of speech or press, but instead concerned access to a source of information. The Court reached this decision after making two observations. First, criminal trials historically have been open to the public.⁶⁵ Second, the right to attend criminal trials is implicit in the guarantees of the First Amendment, for without this freedom the explicit freedoms of speech and press are meaningless.⁶⁶

The Court examined the tradition of open criminal trials and found significance in the reasons for this long-standing rule. Specifically,

62. Nimmer, *supra* note 26, § 1.04.

63. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The Court based its decision in *Globe* on the analysis in *Richmond*. Because of the similarity of the two cases, only *Richmond* is specifically discussed.

64. 448 U.S. 555 (1980).

65. *Id.* at 564-74.

66. *Id.* at 574-80.

openness assures the fairness of the trial and discourages perjury.⁶⁷ It also operates as a political check on the judicial arm of the government,⁶⁸ as a therapeutic tool for both individuals and the community,⁶⁹ and as an educational tool.⁷⁰

These functions of the open trial system correspond to the values underlying the First Amendment. The twin First Amendment goals of the advancement of knowledge and the attainment of truth are satisfied by open trials because allowing public access assures fair trials, discourages perjury, and is a means of educating the public about the judicial system. Further, open trials allow individuals to participate effectively in the political system. In addition to advancing the knowledge necessary for intelligent political decision making, open trials have therapeutic value because they provide an outlet for community emotion.⁷¹ By eliminating these volatile forces, open trials lead to a more stable society while providing the information necessary for society to determine the need for changes in the justice system. On an individual level, the system prevents vigilantism by openly assuring the public that justice has been served in a particular case. The individual's possession and use of the knowledge attained by attending criminal trials is a means of self-fulfillment. Since the tradition of public criminal trials serves the purposes which underlie the First Amendment, the First Amendment's umbrella of protection shelters this right against government encroachment.

The Court found it insignificant that the right violated in this case—the public's right of access to information—was not explicitly guaranteed by the First Amendment.⁷² Quoting *First National Bank v. Bellotti*,⁷³ the Court expressed the belief that First Amendment protection extends beyond the press and self-expression, and prohibits the government from limiting the stock of information available to the general public.⁷⁴ Since trials are an important source of information, denial of access to criminal trials is tantamount to denial of a source of information. When the government denies individuals access to

67. *Id.* at 569.

68. *Id.* at 569–70.

69. *Id.* at 570.

70. *Id.* at 572.

71. *Id.* at 571.

72. *Id.* at 575.

73. 435 U.S. 765 (1978).

74. *Richmond Newspapers*, 448 U.S. at 575–76.

information, it also prevents them from communicating that information. It is this abridgment of speech that the First Amendment expressly prohibits.

The cases examining the public's right of access to trials exemplify how the Court has used the values underlying the First Amendment in its decisions. If a source of information, such as a criminal trial, promotes individual self-fulfillment, the advancement of knowledge and discovery of truth, and participation by members of society in decision making, the Court is likely to uphold the First Amendment right of access to that information.

III. PROTECTION OF FIRST AMENDMENT VALUES IN THE ENVIRONMENT

Like criminal trials, the ancient forest environment is a source of information. Each of the three values that the Court discussed in *Richmond Newspapers*⁷⁵ also is present in the ancient forest ecosystem. Since past attempts to find a constitutional basis for environmental protection have failed, preservationists should argue that their claims implicate a First Amendment right of access to a source of information and ask the courts to rule in favor of preservation.

A. *The Environment as a Source of Information*

The environment is an important, but often overlooked, source of information. Society's need for and use of the information obtainable only from study of undisturbed environments implicates the three values that underlie the First Amendment.⁷⁶ Because the environment is a source of information and its preservation is necessary to achieve self-fulfillment and obtain knowledge, truth, and the participation of individuals in decision making, courts should use First Amendment analysis to prohibit government action that inhibits access to this source.

75. See *supra* notes 63-74 and accompanying text.

76. See *supra* notes 46-62 and accompanying text.

1. *The Environment and Individual Self-Fulfillment*

Although very little old-growth forest remains in the United States,⁷⁷ preservation of the remnants of these biologically rich environments is possible and will promote the goal of self-fulfillment in two ways. First, the beauty of natural environments, undisturbed by development or logging, gives a sense of dignity to those who experience it. This feeling is comparable to that of an art lover who beholds the Sistine Chapel. Second, the ancient forests serve as a natural laboratory for researchers who wish to observe and evaluate the biological processes inherent in these systems. These scientists' identities are tied up in their research activities; their work enhances personal feelings of worth.

Individuals can achieve self-fulfillment when they experience the environment in its natural state. Most people would agree that the Grand Canyon is one of the most beautiful landscapes in the country. Most would also agree that the destruction of this natural wonder would be a tragedy.⁷⁸ They feel this way because the Grand Canyon's existence fulfills them in a unique way. An important aspect of an undisturbed ecosystem is the beauty contained therein, and observation of that beauty generates a sense of well-being in most people.⁷⁹ For example, thousands of people "escape" the urban landscape every year to visit wilderness areas.⁸⁰ Why do so many people visit the Grand Canyon each year? Each one hopes for a unique experience, an identification with nature that will somehow make him or her a better person.

77. See *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1088 (W.D. Wash. 1991) (finding that old-growth forests have been "significantly reduced," with only ten percent of the original Northwest great conifer forest remaining, and that nearly all old-growth has been removed on private lands), *aff'd in part and rev'd in part*, 952 F.2d 297 (9th Cir. 1991).

78. In 1963 the federal government proposed to dam the Colorado River, which would result in partial flooding of the Grand Canyon. This plan greatly upset many people, including David Brower of the Sierra Club, and served as one of the mobilizing causes surrounding the creation of the first Earth Day on April 22, 1970. Robert V. Percival, et al., *Environmental Regulation: Law, Science, and Policy* 4 (1992).

79. Thaddeus Mason Harris, an early nineteenth-century minister, referred to the wilderness as the source of an "expansion of fancy and an elevation of thought more dignified and noble." According to Harris, the immensity of nature leads humans to contemplate and comprehend their personal dignity and power. He wrote that "[t]he sublime in nature captivates while it awes, and charms while it elevates and expands the soul." Roderick Nash, *Wilderness and the American Mind* 57-59 (3d ed. 1982) (citing Thaddeus Harris, *The Journal of a Tour into the Territory Northwest of the Allegheny Mountains* 71-72 (1805)).

80. According to the National Park Service, this country's national park system saw a total of 272,843,226 visits in 1992. Telephone Interview with Nancy Stromsem, Public Affairs Officer, National Park Service (Mar. 7, 1993).

For many Eastern and Native American cultures, the identification with nature is spiritual. Their gods are intimately linked with nature, and humans are merely one part of the total design.⁸¹ This view of the world is not limited to other cultures. Chris Maser, a forestry scientist at the University of Washington, strongly believes that the fates of humans are connected to the ancient forests.⁸² Other scientists, such as Edward O. Wilson, share this belief.⁸³ Even politicians can have a spiritual side.⁸⁴

Scientists experience self-fulfillment from their research activities because their work provides them the opportunity to contribute to human knowledge and welfare, and to encourage social change by communicating the information obtained from this research to the general public.⁸⁵ The opportunity to realize these goals is a necessary part of a researcher's self-fulfillment, and governmental interference with the source of information essential to this self-expression will prevent a

81. The traditional Native American culture reveres the natural world:

We are part of the earth and the earth is a part of us. The fragrant flowers are our sisters, the reindeer, the horse, the great eagle our brothers. The foamy crests of waves in the river, the sap of meadow flowers, the pony's sweat and the man's sweat is all one and the same race, our race. . . . All things are bound together. All things connect. What happens to the Earth happens to the children of the Earth. Man has not woven the web of life. He is but one thread. Whatever he does to the web, he does to himself.

How Can One Sell the Air? in *How Can One Sell the Air? A Manifesto for the Earth* 9, 14 (Book Publishing Co. 1980).

82. Chris Maser, *Forest Primeval: The Natural History of an Ancient Forest* 229-30 (1989).

83. Edward O. Wilson, *Is Humanity Suicidal?*, N.Y. Times, May 30, 1993, at G24.

84. Vice President Al Gore opens his book on environmental policy with this thought: "[T]his perspective cannot treat the earth as something separate from human civilization; we are part of the whole too, and looking at it ultimately means also looking at ourselves." Al Gore, *Earth in the Balance: Ecology and the Human Spirit* 2 (1993).

85. Scientists' ultimate goal is communication of their findings:

Biologists wish to convince others of the importance of protecting biodiversity, including ecological and evolutionary processes.

. . . To the biologist, it may appear to be perfectly obvious that knowledge will lead to action — that once another human being . . . understands the dimensions of the current spasm of species extinction and understands the agricultural, economic, and climatic implications of deforestation and desertization, that human being will *have* to do something about it and will simply be *forced* to join conservation organizations, change his or her lifestyle, contribute lots of money to the right causes, and vote the right way.

Michael E. Soulé, *Mind in the Biosphere; Mind of the Biosphere*, in *Biodiversity* 465, 467 (E.O. Wilson ed., 1988).

researcher from reaching this ultimate goal.⁸⁶ For effective research, ancient forests must remain intact.⁸⁷

Both researchers and the public rely on the availability of undisturbed environments. While the public uses the environment for recreation, researchers use the environment as a natural laboratory. Both uses lead to the self-fulfillment of individuals.

2. *The Environment as a Means of Advancing Knowledge and Obtaining Truth*

The Court's justification for First Amendment protection of sources of information is based in part on a belief in society's need for maximum exposure to new and different knowledge and ideas.⁸⁸ Scientists and researchers study the natural environment in order to acquire knowledge that they can later interpret and communicate to the public. Legislation or activity that destroys a source of information completely denies a researcher the opportunity to acquire knowledge from that source. Therefore, when the government extinguishes a source of information, it is also limiting society's exposure to knowledge.

Undeniably, scientists and society can gain a great deal of information from intensive research of old-growth forests. Destroying the forests without knowing the potential of their contents is foolhardy. For example, scientists recently discovered taxol, a breakthrough drug in the treatment of breast and ovarian cancer, in the bark of the Pacific yew tree.⁸⁹ Due to its slow growth pattern and logging of its native environs, the Pacific yew is rare.⁹⁰ Although the discovery of taxol seems to

86. *Kaimowitz v. Michigan Dep't of Mental Health*, 42 U.S.L.W. 2063, 2064 (Cir. Ct. Wayne Cty., Mich., 1973) (stating that the freedom of expression is meaningless unless the First Amendment also provides the freedom to create something to be expressed).

87. For a detailed explanation on the research value of ancient forests, see Elliott A. Norse, *Ancient Forests of the Pacific Northwest* 149–52 (1990). Some argue that if the purpose of preserving old-growth is to allow research, this objective can be accomplished by preservation of one million acres, and the remaining five million can be logged. However, following this course of action sets a precedent that has no stopping point. Once one million acres remain, those who were previously successful in accomplishing this will present the same argument in favor of logging all but one thousand acres, and so on. The question of “how much is enough” will always be debated. However, given the proportion of remaining old-growth in comparison with original quantities, combined with our lack of complete knowledge of the functions this ecosystem performs, the wiser course of action appears to be to err on the side of “too much.” This will forestall complete loss in the event of a natural disaster or disease.

88. See *supra* notes 53–58 and accompanying text.

89. Norse, *supra* note 87, at 110–11.

90. *Id.*

justify further logging in order to obtain greater quantities of the drug, this is not strictly necessary. Now that scientists have discovered the drug, researchers can endeavor to reproduce it synthetically. Conversely, the need for the forests as a starting place for medical research still exists. As a chemical compound, taxol is so complex that it is doubtful whether someone would have invented it from scratch.⁹¹

Taxol is not an anomaly. Humans rely heavily on wild organisms for medicine. In the United States, a quarter of all pharmaceutical prescriptions are substances extracted from plants.⁹² An additional thirteen percent originate in microorganisms and three percent more come from animals.⁹³ These substances are used to treat all kinds of maladies, from cancer and high blood pressure to fungal infections and migraine headaches.⁹⁴ Another example of a single species whose biochemistry grabbed the world's attention is the rosy periwinkle of Madagascar. This inconspicuous plant produces two alkaloids that cure most victims of two deadly cancers—Hodgkin's disease and acute lymphocytic leukemia.⁹⁵ The discovery of medicines in native plants such as these produces economic benefit, as well, for the income from the manufacture and sale of the two periwinkle alkaloids exceeds \$180 million per year.⁹⁶

The ancient forests provide more than new medicines. Forestry scientists study the genetic diversity within these ecosystems and use this information to improve managed forests. Genetic engineering has increased productivity of other crop species, and can be used with managed forests as well.⁹⁷ The ancient forest ecosystem is an irreplaceable source of genes that can be transferred to domesticated species. Studies of old-growth forests have revealed that genetic diversity provides a natural hedge against disease and insect damage.⁹⁸ Forest crops simply do not contain the same level of genetic diversity as natural, unlogged and unmanaged old-growth.⁹⁹ While the current market creates a need for broadly adapted and faster growing trees from

91. Michael Rogers, *Penicillin From a Screen?*, Newsweek, Sept. 14, 1992, at 58.

92. Edward O. Wilson, *The Diversity of Life* 283–85 (1992).

93. *Id.* at 285.

94. *Id.* at 286–87.

95. *Id.* at 283.

96. *Id.*

97. *Id.* at 303.

98. *Id.* at 301.

99. Seri G. Rudolph, *Ancient Forests as Genetic Reserves for Forestry*, in *Ancient Forests of the Pacific Northwest*, *supra* note 87, at 130–31.

intensively managed sites, market conditions may change and intensive management may become infeasible. At this point, forest managers can restore the original low-maintenance type of forest vegetation only if its genetic source still exists.¹⁰⁰ In this context, the ancient forest can be compared to a set of genetic encyclopedias. Clearcutting the land and reforesting it with a new “crop” of trees is similar to the removal and disposal of volumes A through P.¹⁰¹

Plants have also been underutilized as sources of food. Currently, only twenty species provide ninety percent of the world’s food and three species—wheat, maize, and rice—supply more than half.¹⁰² This is true even though approximately 30,000 species of plants have edible parts.¹⁰³ The only reasons for this homogeneity seem to be human prejudice and inertia.

The Ninth Circuit recognized the importance of information inherent in plant and animal species, and decried its loss, in *Mount Graham Red Squirrel v. Madigan*.¹⁰⁴ After denying an injunction on construction of telescopes in the habitat of the endangered red squirrel, the Court stated:

The possible extinction of an endangered species is not a threat that we take lightly. If the Mount Graham Red Squirrel becomes extinct as a result of the astrophysical research project, then the new telescopes will not represent an unqualified step forward in our quest for greater knowledge. As we expand our horizons by building bigger and better telescopes, we would do well to remember that we also have much to learn from the plant and animal life in the world around us. By contributing to the

100. *Id.*

101. The Supreme Court addressed this problem in *Tennessee Valley Authority v. Hill*, citing a House Committee Report discussing the ESA.

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable.

....

From the most narrow possible point of view, *it is in the best interests of mankind to minimize the losses of genetic variations*. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

437 U.S. 153, 178 (1978) (citing H.R. Rep. No. 93-412, 93d Cong., 1st Sess., 4-5 (1973)).

102. Wilson, *supra* note 92, at 287-88.

103. *Id.*

104. 954 F.2d 1441, 1463 (9th Cir. 1992).

extinction of an endangered species, we limit our horizons at least as seriously as we do by delaying or even disallowing the construction of new telescopes.¹⁰⁵

The danger goes beyond the loss of a single species. The disappearance of one species may not produce a noticeable effect because another will increase in number to take its place.¹⁰⁶ Over time, however, as more and more species are eliminated through human intervention and natural disasters, the local ecosystem will start to decay visibly. Productivity will drop and the system will need increasing amounts of time to restore itself. If left alone, a new combination of species will establish themselves and reinvigorate the land. Unfortunately, humans are unwilling to allow ecosystems the time they need to once again realize full productivity.

3. *The Role of the Environment in Encouraging Participation by Members of Society in Decision Making*

The information scientists obtain from the environment is indispensable to informed public participation in decisions regarding such issues as the development of management plans for forest resources, the production and marketing of new medicines, and the formulation of public policy on environmental protection. Even Alexander Meiklejohn, who originally argued that the First Amendment's protections should be limited to political speech, would extend unabridged protection to scientific information because of its role in public decision making.¹⁰⁷ This vital information will be lost, and therefore its discovery by scientists and its use by society impossible, if the Forest Service sells the last remaining old-growth timber.¹⁰⁸

Information obtainable only from the environment is a vital element of effective decision making. It directly aids decision making because it

105. *Id.* at 1463. The red squirrel caused former Interior Secretary Manuel Lujan to become the butt of many political jokes when he said, "Nobody's told me the difference between a red squirrel, a black one or a brown one." Angus Phillips, *Lujan and the Battle of the Species*, Washington Post, May 15, 1990, at E1.

106. Wilson, *supra* note 92, at 14.

107. Alexander Meiklejohn, *The First Amendment is an Absolute*, in Alexander Meiklejohn: *Teacher of Freedom* 246, 250 (Cynthia Stokes Brown ed., 1981).

108. "'We're probably just on the edge in terms of our understanding [of the role of old-growth in the ecosystem],' says Eric Forsman, a biologist with the Forest Service. 'If we continue pell-mell down the path of eliminating these old forests, we'll never have the opportunity to learn because they won't be there to study.'" Ted Gup, *Owl vs Man: In the Northwest's Battle Over Logging, Jobs Are at Stake, But So Are Irreplaceable Ancient Forests*, Time, June 25, 1990, at 56, 59.

provides information on specific issues such as forest management, human health, and wildlife preservation. Information gleaned from the study of ancient forests also aids decision making indirectly by providing the basis for individuals to form opinions and ideals regarding these issues. Therefore, judicial preservation of the ancient forests would help achieve the third First Amendment goal of improving decision making by the members of society.

Since the role of the ancient forest in maintaining a socially desired quality of life is not yet clear, the effects of its destruction cannot be accurately predicted. While some of this information has already been discovered¹⁰⁹ and is available for the public to use in making policy decisions about the disposition of public lands, much more awaits discovery. Preservation of the forests is necessary for scientists to improve the public's knowledge and understanding of the world.

B. Right-to-Access Cases Support Application of the First Amendment to the Environment

When judges order closed trials, they deny the press and public access to information.¹¹⁰ This denial frustrates the three identified purposes of the First Amendment.¹¹¹ For this reason, the *Richmond Newspapers* Court held that this type of order violates the First Amendment.

The environment is another context where the government controls a source of information. The values recognized in First Amendment cases should be protected in this setting as well. Preservation of ancient forest ecosystems allows researchers to do the work that contributes to their sense of identity and gives them and others greater autonomy over the development of their personal ideas and values. A greater pool of information, and hence a more complete understanding of the natural world and its relationship to mankind, also originates from researchers' activities. This information is the basis for individuals to develop opinions on issues that affect their everyday lives, and is essential for effective decision making.

This is not an argument that the government must provide access to the information within ancient forests. As previously noted, the

109. "What is known is that the old-growth plays an integral role in regulating water levels and quality, cleaning the air, enhancing the productivity of fisheries and enriching the stability and character of the soil." *Id.*

110. See *supra* notes 63–74 and accompanying text.

111. See *supra* notes 63–74 and accompanying text.

government generally does not have a duty to provide information or access to it.¹¹² In a situation where the Forest Service has made the decision to lease old-growth lands for logging, environmental plaintiffs opposed to such action are not demanding that the Forest Service make the information within the forests available to them. Instead, they are requesting that the government refrain from destroying it. This is analogous to *Board of Education, Island Trees v. Pico*,¹¹³ where the students challenged the school board's authority to remove information which had been available to them.¹¹⁴ The students were not questioning, nor would the First Amendment prohibit, the board's initial choice of books to place on the shelves. However, the First Amendment does prohibit the board from denying students access to the information in books already on the shelves by ordering the books' removal.

The premise of this Comment is that ancient forest ecosystems, like criminal trials and library books, are important sources of information. Some may argue that analogizing the information within ancient forests to criminal trials and libraries creates the infamous slippery slope. In other words, the ultimate extension of this argument is that the First Amendment forbids the government from destroying any source of information under its control. However, under the balancing approach that the Court is so fond of, the forest can be distinguished from most other sources of information. First, scientists have not fully unearthed the information contained in the forests.¹¹⁵ Second, the information is irretrievable once destroyed.¹¹⁶ The information contained in these ecosystems impacts human life in a unique way. Since the loss of

112. See *supra* notes 35–37 and accompanying text.

113. 457 U.S. 853 (1982). See *supra* notes 36–37 and accompanying text.

114. *Id.*

115. See *From the Amazon, Face of a New Species*, National Geographic, Mar. 1993, at 134. National Geographic reports that three new primate species have been discovered in Amazon rainforests since 1990. This is remarkable because primates are well known and well studied. This in turn leads one to wonder how many other plant and animal species await discovery. Scientists currently estimate the number of known species of organisms, including all plants, animals, and microorganisms, to be 1.4 million. Wilson, *supra* note 92 at 132–33. Evolutionary biologists generally agree that this estimate is less than a tenth of the number that actually live on earth. *Id.* If discovery of other species does not occur before logging of the habitat, the species will be lost forever.

116. See Wilson, *supra* note 83, at G24 (claiming that humans are dismantling a support system that is too complex to understand, let alone replace, in the foreseeable future).

species and habitat can be particularly harmful to humans,¹¹⁷ the balance should be tipped in favor of preservation.

IV. CONCLUSION

A corollary to the First Amendment's protection of free expression is its protection of the freedom to receive information. The courts are more likely to extend this First Amendment protection to sources of information that contribute to an individual's sense of self-fulfillment, provide society with information, and aid individuals in making decisions. The old-growth forests of the Pacific Northwest are one such source of information. Although the northern spotted owl and the ESA have long been the tools of choice for environmental plaintiffs, their focus should shift to the First Amendment interests within the forest itself.

117. The importance of other species to humans should not be underestimated. Edward O. Wilson estimates that if the insects and other land-dwelling arthropods were to disappear from our planet, humanity probably would not last more than a few months. Wilson, *supra* note 92, at 133.